Supreme Court, U. S.
FILED
NOV 20 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-341

CLARENCE FIRSTENBERG,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

OPPOSITION OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT, DIVISION FIVE

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OPINION BELOW

The opinion of the California Court of Appeal (App.A of Petition) is reported at 92 Cal.App.3d 570.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether California Health and Safety Code sections 1278 and 1421(a), authorizing warrantless inspections of health care facilities, are "carefully limited in time, place, and scope," thereby satisfying the test of reasonableness set forth in United States v. Biswell, 406 U.S. 311, 315.

STATUTES INVOLVED

The pertinent provisions of California Health and Safety Code sections 1278 and 1421 are set forth in the Petition at p.6.

STATEMENT OF THE CASE

Petitioner was the licensee of Lincoln Care Center (Lincoln), a

skilled nursing facility within the meaning of California Health and Safety Code section 1250. He was convicted, following a jury trial, of violating California Health and Safety Code section 1290, an enabling statute which, in conjunction with Title 22, California Administrative Code section 72557, makes it a misdemeanor to comingle patients' funds with ones own.

Evidence of the violation was discovered during February 1976 by Frank Batchkoff, a surveyor for the Los Angeles County Department of Health Services, who had responsibility for inspecting health facilities for the State of California (Health and Safety Code section 1257.) While reviewing Lincoln records, he discovered two checks totalling $19,000 which had been drawn against the patients' trust account and deposited into two payroll accounts. The administrator of the facility allowed Batchkoff to make copies of these checks. Based

upon these checks and the information provided by Batchkoff, a warrant was obtained and a further search was conducted.

ARGUMENT

I

THE DECISION BELOW IS CLEARLY CORRECT AND DOES NOT CONFLICT WITH ANY APPLICABLE DECISION OF THIS COURT

After a careful examination of the record before it, and after thoughtful consideration of the nature of the long-term health care industry and the potential therein for patient abuse, both as to their physical and their financial well being, the Court of Appeal quite properly held that warrantless, unannounced inspections of such health care facilities are reasonable within the meaning of the Fourth Amendment.

In so holding, the Court of Appeal considered the teachings of this court in Colonnade v. United States,

397 U.S. 72, United States v. Biswell, 406 U.S. 311, and Marshall v. Barlow's, 436 U.S. 307.[1/] As required under these cases, the Court examined the history of regulation in the health care industry. Its finding that the industry has had a lengthy history of extensive regulation, dating as far back as 1925, led it to recognize that warrantless inspections of the health care industry were reasonable under the Fourth Amendment. Additionally, as required by Camara v. Municipal Court, supra, at 535, it considered the specific enforcement needs within the nursing home field. Realizing the helplessness that characterizes the average patient in such facilities, the court acknowledged the necessity for frequent and unannounced inspections in order to

1/ Notwithstanding petitioner's suggestion to the contrary, the Court of Appeal also considered and carefully distinguished, the warrantless inspection statutes and their regulatory framework in Camara v. Municipal Court, 387 U.S. 523, and See v. Seattle, 387 U.S. 541.

effectively protect both the patients' physical and financial welfare.

Petitioner, though apparently conceeding the appropriateness of warrantless inspections in the nursing home field, nonetheless argues that the search in his case was unconstitutional. This conclusion, predicated upon his assumption that the warrantless inspection statutesat issue are not carefully limited as to time, place, and scope as required under Biswell, does not address and therefore fails to consider the reasoned analysis of the Court of Appeal.

In concluding that sections 1278 and 1421 were "carefully limited as to time, place, and scope", the Court considered these statutes in the context of the realities of the nursing home industry and the specific enforcement needs therein.

Section 1278 provides that entry may be made "at any reasonable time". Inspection may be made, "to secure compliance with, or to prevent a violation of, any provision of . . .

[Chapter 2]." Though by its terms section 1278 provides that "any building or premises" may be the subject of an inspection, the court considered the context in which these words are used, and concluded that in fact the statute was referring only to any licensed building or premises.

Section 1421 expressly designates long-term health care facilities as the premises to be inspected. It differs from section 1278 in two respects: It expressly authorizes review of the facility's records rather than just its premises; and it authorizes entry "at any time." Though recognizing that inspection statutes typically call for entry during business hours (United States v. Biswell, supra; Colonnade v. United States, supra), because long-term health care facilities by statutory definition (California Health and Safety Code section 1418) provide 24-hour skilled nursing services, the Court concluded that it was not only reasonable, but essential to successful

enforcement of the regulatory provisions that inspections be allowed at any time. Acknowledging that both Biswell and Colonnade dealt with statutes calling for inspections of business record--a point carefully overlooked by petitioner--the Court found that the potential for abuse in the area of patient financial welfare mandated the frequent, unannounced inspection of a facility's business records.

After performing the above analysis, the Court properly concluded that the statutes at issue passed constitutional muster.

CONCLUSION

For the foregoing reasons, the People of the State of California respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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